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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1261

CONSTRUCTION AGGREGATES CORPORATION,
A DELAWARE CORPORATION,
Petitioner,

vs.

HEWITT-ROBINS, INCORPORATED,
A NEW YORK CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Petitioner Construction Aggregates Company prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit in this cause and respectfully shows the court:

OPINION BELOW.

The opinion below is reported at 404 F. 2d 505.

JURISDICTION OF THIS COURT.

The judgment of the Court of Appeals was entered December 3, 1968 and the petition for rehearing was denied January 15, 1969. The jurisdiction of this court is invoked under 28 U. S. C. § 1254(1).

THE QUESTIONS PRESENTED FOR REVIEW.

In an action for breach of implied warranties arising from a contract to design and furnish a conveyor system

1. Whether the courts below erred in failing to hold that as a matter of law a contract between the parties was formed on or before June 30, 1962, consisting of the fully-authorized offer in defendant's letter of May 25, 1962, as modified by authorized additional discounts in defendant's letter of June 20, 1962, as accepted by plaintiff on that date and confirmed by plaintiff's letter of June 30, 1962.
2. Whether the Court of Appeals erred in construing § 2-207 of the Uniform Commercial Code, which became effective July 1, 1962 contrary to the explicit language of the statute, to the intent of the statute as expressed in both the Uniform Commercial Code Comment and the Illinois Code Comment, and to decisions of other courts, in holding that defendant's letter of July 20, 1962 "in effect" could be construed as "acceptance expressly made conditional on assent" to the disclaimer of warranties under § 2-207(1) and that a telephone conversation could be "assumed an acquiescence" despite the command of § 2-207(3) that the terms of the contract are those "on which the writings of the parties agree."
3. Whether the action of the trial judge in sending the written instructions to the jury room in the absence of the parties and counsel and without notice to them and an opportunity to object to such action was a denial of due process of law.

THE STATUTES INVOLVED.

The Uniform Commercial Code (Ill. Rev. Stat., 1961, ch. 26) became effective July 1, 1962 (Ill. Rev. Stat., ch. 26, § 10-101).

Under petitioner's (plaintiff's) Point I, that a binding contract was entered into by the May and June 19, 1962 letters and conversations, the applicable statute, governing implied warranties, is § 15(1) of the Uniform Sales Act (Ill. Rev. Stat., 1961, ch. 121½, § 15.1):

> "15. Implied warranties of quality.] § 15. Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:
>
> "(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is [an] implied warranty that the goods shall be reasonably fit for such purpose.
>
> "(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.
>
> "(3) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.
>
> "(4) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.
>
> "(5) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usages of trade.